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No. 92-487

Supreme Court, U.S.
FILED
OCT 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

v.

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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A writ of certiorari is sought to review three questions raised by the *Robinson* and *Sintra* opinions of the

Washington State Supreme Court. The questions for which review is sought are summarized:

(1) Does an unduly oppressive land use regulation violate Fourteenth Amendment Due Process guarantees?

(2) Does continued enforcement of a land use ordinance after it has been declared facially invalid by a state trial court deprive property owners of their property without Fourteenth Amendment Due Process?

(3) Do governmental officials violate a clearly established constitutional right so as to lose qualified immunity under 42 U.S.C. § 1983 when they continue to enforce a local ordinance after it has been determined facially invalid by a court of competent jurisdiction?

Respondents' agree that the first question merits issuance of the writ to consider not only that question but related takings, due process, and 42 U.S.C. § 1983 questions raised in respondents' cross-petition. However the Washington Supreme Court's disposition of the second and third question is clearly justified by settled law and merits no further review.

1. This Court Should Grant Certiorari to Review Washington Supreme Court's Disposition of Unduly Oppressive Land Use Regulations.

Petitioners are right that review should be granted of this question, but for the wrong reasons. *Lawton v. Steele*, 152 U.S. 133 (1984) holds that the means to achieve

an otherwise legitimate end must be reasonably necessary to accomplish the purpose and not be "unduly oppressive upon individuals." *Lawton* at 137. This is a test of means, not ends, which "is still valid today . . . " *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

The test does not purport to define the legitimacy of ultimate police power objectives but rather to impose limitations on the means employed.

Here the means employed was found to be "unduly oppressive" because the HPO would shift to the shoulders of a few land owners the responsibility to cure the complex problems of housing availability by those of limited means. The problem is not new. See e.g. *Pennell v. San Jose*, 485 U.S. 1 (1988). However it is the problem of society as a whole, not just the respondents in this case. The analog to the issue raised by petitioners is identified in the cross-petition of the respondents: Is an ordinance which is unduly oppressive because it improperly shifts the costs of solving a social problem to the shoulders of present land owners a taking as well because it forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole?" *Armstrong v. United States*, 364 U.S. 40, 48 (1960). Further, the question must inevitably arise that if HPO deprives an owner of his property without due process can the owner be deprived his remedy under 42 U.S.C. § 1983, as the Washington Supreme Court so held? Any constitutional deprivation, under color of law, would seem to plainly merit the § 1983 remedy without qualification. *Monroe v. Pape*, 365 U.S. 167 (1961); *Carey v. Piphus*, 435 U.S. 247 (1978); *Owen v. Independence*, 445 U.S. 622 (1980); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

2. Does Continued Enforcement of a Land Use Ordinance After it Has Been Declared Facially Invalid Also Violate Due Process?

While holding that the HPO facially deprives owners of their property without due process because of its unduly oppressive nature, the Washington Supreme Court nevertheless does not allow the remedy provided by § 1983. The § 1983 remedy is limited by the Washington court to a separate due process violation arising from continued enforcement of an ordinance after it was declared facially invalid.

Factually HPO I was declared facially invalid by the trial court in 1983. The City did not attempt to stay enforcement of the judgment nor appeal the judgment. Rather the City continued enforcement through the summer of 1985 when it replaced HPO I with an almost identical HPO II. In the summer of 1986 the license fee provisions of HPO II were again found facially invalid, a determination from which the City appealed however did not seek to stay. The City again continued enforcement (imposing a $219,000 license fee on Sintra in the meantime) until April 1987 when the State Supreme Court affirmed the trial court.

Thereafter the City repeated its pattern of enforcement when it contemptuously violated a permanent injunction against any enforcement of the tenant relocation provisions of HPO II imposed by the trial court in December 1987 until it, and its enforcement officers, were held in contempt of court in March 1988 for their conduct. *R/L v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989).

The City seems to argue it may disregard trial court decrees of facial invalidity with impunity whether or not it even files an appeal. However even the pendency of an appeal does not negate the preclusive effect of a Washington trial court judgment. *Riblet v. Ideal Cement Company*, 57 Wn.2d 619, 621, 358 P.2d 975, 977 (1961); *Seattle National Company v. Gilmore*, 167 Wash. 102, 9 P. 95 (1932); Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 824 (1985).

The City's wilful, deliberate, and malicious enforcement of these ordinances after they had been declared facially invalid is clearly a due process violation and the Washington Supreme Court was correct to so hold.

3. Qualified Immunity to Suit Under 42 U.S.C. § 1983 is Not Dependent Upon Subjective Legal Advice.

Whether or not an official is entitled to qualified immunity under 42 U.S.C. 1983 depends on whether or not he violated "clearly established statutory or constitutional rights" of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test is an objective one. No post-*Harlow* Supreme Court decision substitutes the subjective state of the actor's mind, whether prompted by advice of counsel or otherwise, to determine the availability of the qualified immunity defense.

Thus the Washington State Supreme Court was clearly correct when it held in both *Sintra* and *Robinson* that the advice of counsel, per se, does not establish the right to successfully claim qualified immunity. The court

remanded this matter to the trial court for factual development.

Moreover the record discloses a weak, if existent, claim that the City and its enforcement officers were following the advice of counsel by continued enforcement of the HPO, court decrees notwithstanding. For example, there is no written memorandum in the record conveyed to the City or any of its enforcement officers from the Seattle City Attorney's office providing any reasoned analysis whatsoever disagreeing with any of the three trial court conclusions that the ordinance was facially invalid. Rather the nature of the "advice", insofar as it could be characterized as such, is a tactical decision to continue enforcement to reap ill-gotten gains rather than a reasoned disagreement with the rational of the trial court decisions, not to mention direct and/or collateral estoppel effect per se. In point of fact, the "advice" paid off because the Washington Supreme Court barred approximately one-half of the claims of the *Robinson* class finding that the statute of limitations had run on all payments made before May 1985.

Seattle City Attorney James Fearn, in a seminar context, candidly explained that while courts would have "no problem" finding a taking under the HPO " . . . *Nollan* [*v. California Coastal Commission*, 483 U.S. 825 (1987)] and the constitution do not get to the permit counter." (*Robinson* CP 122)

In contrast, the record discloses many legal memorandums submitted to City employees with HPO enforcement responsibilities (from nonCity attorneys) setting forth in exhaustive detail HPO invalidity. So if

employees were entitled to rely upon "legal advice," they disregarded it when it came from outside sources.

In fact the record discloses that enforcement officers acted contrary to the advice of the City attorney when they declined to provide full administrative relief to Sintra. *Sintra, supra* at 26.

The issue of qualified immunity was correctly decided by the Washington Supreme Court and does not merit further review.

CONCLUSION

Certiorari should be granted on "overly oppressive" due process violations and related takings and 42 U.S.C. § 1983 issues raised by cross-petitioners. Certiorari should be denied on other issues.

Respectfully submitted,

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